IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

THE STATE OF TEXAS, et al,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	Case No.:
	§	4:20-cv-00957-SDJ
GOOGLE, LLC,	§	
	§	
Defendant.	§	

MOTION HEARING
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SEAN D. JORDAN
UNITED STATES DISTRICT JUDGE

Monday, May 6, 2024; 10:04 a.m.
Plano, Texas

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(Continued on page 2.)

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May 6, 2024 10:04 a.m.

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P R O C E E D I N G S

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THE COURT: Good morning. Please be seated.

MS. WOOD: Good morning, Your Honor.

THE COURT: All right. We are back on cause number 4:20-cv-957, State of Texas, et al versus Google, LLC. And we can start with appearances. And let's go ahead and begin with plaintiffs.

MR. LANIER: Thank you, Your Honor. And with appreciation, for having been gone the last hearing, I was in trial with one of your federal judiciary people in Helena, Montana, and I would have much rather been here.

I've got with me this morning Zeke DeRose from my office. From the Attorney General's office we have Trevor Young and we have James Lloyd. But we also have present today Attorney General Ken Paxton. From Norton Rose Fulbright, we have Jim Renard. And then the DOJ is a separate entity, so I will let Ms. Wood...

MS. WOOD: Good morning, Your Honor. Julia Wood from the Department of Justice, here on behalf of the United States and the state plaintiffs in the EDVA action.

Thank you very much, Your Honor.

THE COURT: All right. Thank you, ma'am.

And welcome to the Attorney General.

And, Google, you're outnumbered again. Go ahead.

MR. AYCOCK: Good morning, Your Honor. Jamie Aycock with Yetter Coleman, on behalf of Google.

And Mr. Yetter sends his regrets for not being able to be here. He's in pretrial --

THE COURT: All right. Well, thank you, counsel.

And we have just one item on the agenda today. We have a submission from the parties that is a Joint Motion For an Order For Reproduction of Discovery. And we have the United States that weighed in on this.

And so I think perhaps a useful starting point may be for counsel to get me up to date on where we are with regard to this particular motion. I did see the United States' submission on Friday regarding the objections that were made in the EDVA to the magistrate judge's decision, and I believe that's been set for hearing.

But I'm happy to have comments from counsel on where we are. Mr. Lanier, you can begin.

MR. LANIER: Thank you. Thank you, Your Honor.

And it's a pleasure to be back in front of you. We appreciate the time and attention not only you, but Special Master David Moran and his able cohorts have worked very hard to get us here. The parties have taken an extreme number of depositions in an extremely short time, as many as six and

seven in a day. And so it has been a lot of hard work by both parties.

One of the concerns that prompted this from us, if I could reduce this to a single sentence, it's that there is a concern that we have an unfair playing field. And by that I mean, this is a three-front war that is being waged, and Google has the same lawyers in all three fronts. Google knows what's happening in the MDL, and they're up on all that discovery and the experts. Google knows what's happening in the Eastern District of Virginia; they are totally up on all that. Google knows what's happening in our case.

Our concern is we would like to make sure that we get the expert reports that have been ordered by Special Master Moran. We think we're entitled to those. We put those arguments in front of you. You don't need me to reiterate anything that you already know. You come in with your homework done.

But I will say this. To the extent we can get those, and we should get those, the reciprocity issue, going back to the Eastern District of Virginia, is important, even to us, because while that judge in the Eastern District of Virginia regulates the docket over there, you regulate this docket. You're not bound by a magistrate in Virginia. You're not bound by a magistrate in Texas. You're not bound by anybody. You run your court as the Article III Judge you

are.

And to the extent we believe we're hearing inconsistent answers about documents and about positions in the depositions we're taking, that have also been taken in the Eastern District of Virginia, it's quite difficult for us to be unable to flesh out those differences for impeachment purposes because of limitations on sharing. And so what we would like to do -- there are no limitations on sharing within Google when they all have the same counsel. We just want a level playing field. And that's our status.

THE COURT: All right. Thank you, Mr. Lanier.

So Mr. Aycock, do you want to speak on Google's behalf of where we are?

MR. AYCOCK: Yes, Your Honor. So I just remind the Court this is a joint motion. The parties actually agree here that the documents that we're seeking reproduction of, they are relevant to this lawsuit. And so I agree with Mr. Lanier, his comments, about the Virginia court regulating its docket.

What's before this Court is whether the documents that we're seeking reproduction of are -- should be within the scope of discovery in this case. And so I just emphasize that it's this Court that determines the scope of discovery in this case, and it's the Virginia court that determines the scope of discovery in its case.

This issue that's been raised about Google somehow taking inconsistent positions, we don't think that's the case in any way, and, in fact, that issue was raised before the magistrate; that is before the Virginia court. I'm happy to get into those, the details of that if that's where we need to go. But what I would just emphasize is what's before the Court today is simply whether these materials should be produced in this case.

And so what should be before the Court, then, is, is there -- if we produce those documents, is that going to violate the protective order in the Virginia case, or is that going to create an issue for the third parties whose confidential information is at issue. And we think it's clear there is no violation of the Virginia protective order. In fact, the protective order contemplates that those documents would be produced in other matters.

And then in terms of any concerns about third parties' confidential information, those would be addressed first, but the vast majority of third parties have actually already consented. We are at the point where we have 115 consents. Only eleven parties have not fully consented at this point; one of those is Meta that has agreed to a narrowing; and one of those is Zulily, which is bankrupt, and so it's just difficult to get consent. But the vast majority have actually already agreed. And there is a process in the

proposed order by which any party that has a concern can raise an objection.

So we think that's all that's before this Court, and we think you should grant the motion.

THE COURT: All right. Thank you, counsel.

Is there something you wanted to say, Ms. Woods?

MS. WOOD: Yes, Your Honor. I will be brief. I promise.

First, we thank the Court very much for the opportunity to be heard on this issue. I want to make our position on behalf of the United States and the State Plaintiffs in the EDVA action very clear. We have no opposition to coordination of documents and discovery between this case and the EDVA action. What we do oppose, however, is one-sided gamesmanship where one party is seeking to take the benefits of that coordinated discovery without providing the reciprocal benefit to the other side. That's what we oppose. So how does that leave Your Honor?

I understand you're on a very tight timetable here, as we are in the Eastern District of Virginia, and we don't want to slow that down. We don't want to impede things. Our number one goal in filing the material we filed with you was, first, to make the Court aware of what was happening because I do think we're in a situation where there's been the ability to present different positions to different courts

and leave different impressions about what's going on, and we wanted to stop that by making all courts aware what was happening in each of the relevant jurisdictions.

But we don't have an objection to providing all discovery -- not even just third-party discovery -- all discovery from the EDVA action. We would not oppose it being reproduced here, provided that this Court, which has jurisdiction of its own protective order, carves out a provision in that protective order to provide the ability of the plaintiffs in the EDVA action to obtain deposition transcripts. That would leave for the Court of Virginia to decide how and whether those deposition transcripts could be used at trial.

But it is this Court's protective order that prevents us from obtaining the deposition transcripts in the first place. And if we obtain them, and the Court in the Eastern District of Virginia does not allow us to use them for impeachment purposes, then we will be on a level playing field with Google.

However, where we are now is they definitely get the transcripts. It's unclear how or whether they'll use them. And we believe this Court has within its sole jurisdiction a construction of its own protective order to at the very least allow the plaintiffs in the EDVA action, including the United States, to obtain those deposition

transcripts that are occurring here. That is a restriction that's contained in the protective order in this action, and Your Honor has the power and the authority to modify that.

THE COURT: All right. Thank you, Ms. Wood.

MS. WOOD: Thank you.

THE COURT: Let me visit with you all about what about this order I find I guess a little bit puzzling. I only say "puzzling" because I am wondering about the scope of the order and its provisions, and I think you all will admit it's an order that looks somewhat unusual in how it's structured; and those go hand in hand.

And when I read the order and look at what's being requested, my thoughts go back to first principles of discovery for this case, for any case. So I think we work backward from the fact that under Rule 26, for example, any items that -- I use this by way of example -- that Google wants to use and Google may want to put into evidence at trial or before trial, those should be items that would be part of their initial disclosures. Plainly, under Rule 26, that is contemplated.

So to the extent that Google wants to use materials that are gathered in the EDVA action or otherwise, and it wants to use them as evidence in this case, then those are part of initial disclosures which, you know, the parties have an obligation to supplement.

Second, as to the States, if the States have made requests for the production of materials that have been produced in other litigation that are relevant under Rule 26, then I would need to know the reason why those should not be produced. And speaking to first principle, I would note as a threshold matter that allowing the sharing of discovery among related cases is an efficient and an effective means of avoiding duplicative and costly discovery and avoiding unnecessary delay in adjudicating cases.

There's many, many cases that stand for this proposition. It's a proposition that's also in *Wright & Miller*. I'm going to quote you from *Wright & Miller*. *Wright & Miller* says one key consideration having to do with potential modification of the protective order is that, "Ordinarily, the most forceful case can be made for access to use material as evidence in other litigation so that later litigants do not have to," quote, unquote, "'reinvent the wheel.' This conclusion flows from the key purpose of discovery -- to develop information for use in litigation. It builds on a long line of cases recognizing the propriety of access to the fruits of one litigation to facilitate the preparation of other cases."

There are many cases that stand for this proposition in Texas, and across the country candidly.

So I look at this request, which is very

specifically worded, and I think why aren't are the parties simply asking for something that I think is more in line with first principles under the rules, that is to say, if you need such an order. And that would be such an order that would require that documents from related litigation that are otherwise relevant and non-privileged should be produced according to Rule 26 with regard to initial disclosures, with regard to any other rules of discovery such as requests for production and interrogatories that are properly made.

Second, that if you're asking for that order and the Court is ordering that that happen, that that be subject to the provisions of protective orders in otherwise related litigation, if there are protective orders in those other jurisdictions that must be complied with, then that's recognized. And that is something that's contained in, by the way, the proposed order, and that makes sense to me.

We need to abide by the protective orders entered in that related litigation as well as the protective order in this litigation. And I note that we have a very robust confidentiality order, we have a robust document on discovery procedures, in this case, which I think touches on this issue. I don't know if you all went back and read it, but it does touch on this issue. We have a specific protocol for expert discovery.

So my view of this for the parties is that I would

prefer to see you come back to this Court, and come back as quick as you would like, but with an order that -- a proposed order, if you feel you need it, that applies what I consider to be basic principles of discovery under Rule 26, under case law interpreting Rule 26 for decades. And if there's a reason why -- if there's a reason why, or authority, that would counsel otherwise that there is something about this litigation, there is something about this case or other cases that counsels that the Court should not follow those principles of discovery, I'm happy to hear about it. I haven't seen it in the filings that have been made.

And I appreciate the United States' position about difficulties, from their perspective, of an unfairness regarding the distribution of discovery materials across these litigations. But as you all have agreed upon today, my responsibility in this court, in this case, is to apply the federal rules of discovery, and that is what I'm going to do.

So I'm happy to hear from any of you if you have a concern about what I have suggested to you or if you otherwise think there are reasons that the principles I've articulated may not apply exactly in this case. But what I'm suggesting to you is that you make an amended filing and that that amended filing follow the rule, follow the precedent that's interpreted the rule.

And the last point I would make is that I agree

with what counsel has said about the protective order at issue in the EDVA and the coordination order there. The protective order there, in the first place, only has to do with confidential and highly confidential information; it says nothing about other information that's otherwise relevant and collected. That's number one.

Number two, what that order says, in paragraphs 25 through 27, about confidential and highly confidential information is, as counsel have noted, that when there is a court order or a subpoena that calls for information that is protected under that order as confidential or highly confidential, then the processes contemplated by that order should be implemented.

I think those processes, again, are addressed in the protocol I have in front of me. But I want to be clear that the Eastern District's order is something that the parties appear to have paid close attention to, and I think any order from this Court would play close attention to. But I'm not going to over read that order, and I don't read that order to apply, in the first instance, to nonconfidential or highly confidential information, nor do I read it as some blanket restriction on the use of such materials in other litigation. Rather, it is meant to provide a protection for nonparties should they be concerned about the use of material collected from them in a related action or it can be used in

this action.

Likewise, I don't see anything in the coordination order, which, by the way, was put into place at the time that this case was part of the MDL, is no longer part of the MDL -- as you all are very well aware, we are under no coordination order at this time. There is no coordination order between this litigation and any of the other cases regarding these issues. So that brings me back to the principle I stated before. My job is to apply the federal rules, and that's what we're going to do.

Any comments you want to make on that, Mr. Lanier?

MR. LANIER: Yes, please. A, understood. B, we will file an amended order, either agreed to or separately. C, we know that today is the deadline under the rules for Google to object to the special master's order granting production of the expert reports from the Eastern District of Virginia. It's still unclear to us whether or not there will be an objection.

And, obviously, because of our time situation, with you having espoused the rules that you have and gone back to basic principles, we will be pressing that matter forward, depending upon whether or not Google is going to make that objection today. And our hope is is that we will, pursuant to what you've just said, wind up getting, and getting expeditiously, those things that we have a right to.

So thank you. And we will file an amended order.

THE COURT: All right. Mr. Aycock?

MR. AYCOCK: Your Honor, I am not prepared to address whether we are objecting to the exhibit reports -- the expert reports, but I believe that we are not filing an objection. I just want to make sure that I understand the guidance from the Court, though --

THE COURT: Sure.

MR. AYCOCK: -- the proposed order, as we talked with the plaintiffs. So my understanding is that Your Honor is emphasizing the fact that we don't include in the proposed order that agreement that the materials that we're seeking reproduction of are relevant and not otherwise privileged.

Is that really the critical issue that Your Honor is pointing us to?

THE COURT: Well, what I'm pointing you to is that I think that whatever you propose should track what the rules require and what the rules have interpreted they require. And I spared you all some quotes from a number of different cases that basically say that, you know, the sharing of discovery among related cases is well-recognized and makes good sense.

So again, my thought on this is if there is a reason to treat this case or these different litigations in another way, I haven't seen it articulated, and I would

consider it if you wanted to bring it forward to me. But what I'm saying, to answer your question precisely, is I think what you're submitting is something that tracks the rules rather than being focused on, you know, X particular document or group of documents; right?

What we're talking about is discovery, however it's been collected, whatever it looks like, that is in related litigation, if it would fall under Rule 26, if it would not otherwise be problematic. For example, there are cases where something would not have been discoverable in related litigation or something like that, or where there's a thought where you need to modify the protective order in a related litigation for some reason, that's indeed the section of *Wright & Miller* that I was looking at, is where you're requesting a modification of a protective order in another district, right, in related litigation.

And what *Wright & Miller* is talking about is a very good reason to do that, to modify that protective order, is so that you can fulfill this principle of litigation, which goes back to rule one; right? This goes back to rule one, that we try to move forward litigation as efficiently as we can and not to do duplicative discovery, not to have plaintiffs across different jurisdictions reinventing the wheel.

So what I'm suggesting is you put it in those broad

terms subject to, for example, the provisions of the protective order, which you have in there. I mean, those provisions I think, you know, generally look fine. And now the government has something -- the United States Government has something it would like to see added. And I will leave it to the parties to visit about that and present it to me if that's what you want to do, or if you -- or if the parties don't agree. The United States is here because it wanted to give its expression of interest. So I'll leave it to you all what you're willing to agree to and if the United States, you know, wants to submit something in that regard.

But for my purposes, what I think should be submitted is this type of order that tracks the rules. And, look, I understand that it will be somewhat unusual because you're essentially asking the Court for an order that says follow the rules; right? That's what you're doing. That's what I -- I understand that, but I am willing to look at an order that says follow the rules and the interpretive case law. And, you know, again, if there's case law going the other way, I'm happy to look at it if somebody wants to present it, I haven't seen it.

And so again I'd say we're going to follow the federal rules, that's what I expect the order to present and the Court to confirm by order. And I understand the purpose here, right, because that is where you're tracking back to

the protective order in the EDVA and you're asking for an order that says this is how we're going to proceed, and that's why I'm willing to consider this order and because I think it is then helpful for this Court and it's helpful for other courts.

But, look, as you mentioned at the beginning of this hearing, we're winding down the clock in this case. The fact discovery period has ended. The Court has allowed some additional specific discrete items of discovery to occur past that deadline. We're into the expert phase.

I'm well aware that in the EDVA, discovery closed a while ago. That case is getting ready for trial in September. And, to my understanding, the MDL discovery period is winding down. I think it's meant to end in June.

So I think, you know, in all of these litigations, you know, I think we're at a point where, you know, the collection and distribution of information that's needed by the parties is something that everyone ought to be focused on. And so that's the reason I'm telling you I'd like to see this amended proposal rather than the current one.

MR. AYCOCK: Thank you, Your Honor.

THE COURT: Does that make sense?

MS. WOOD: Your Honor, just briefly?

THE COURT: Yes. Go ahead.

MS. WOOD: So thank you for that. I understand

Your Honor's instruction. And I just wanted to clarify the role of the United States in that regard because I think we do want to be a part of those discussions, again to ensure that the spirit of the coordination that has always applied, including when this case was part of the MDL, which is that there would be a give and a take, and that both of those take place to provide an efficient finding of truth across all three cases. I think that is absolutely consistent with the rules and the cases that Your Honor has referred to. And so I do look forward to the opportunity to negotiate an order that the United States feels serves its interests as well.

Thank you very much, Your Honor.

THE COURT: All right.

The last thing I want to note to the parties is that we've, you know, made limited exceptions on discovery that had to do with certain depositions that I think just could not be taken prior to the deadline, including depositions that are still under dispute, by the way. And so to the extent that this process, in putting this protocol in place or this order in place and what comes from it, has any kind of ripple effect on being able to complete other discovery, you can let me know that.

Is there anything else we need to discuss today, Mr. Lanier?

MR. LANIER: Not from plaintiffs, Your Honor.

Thank you.

THE COURT: Mr. Aycock, anything from Google?

MR. AYCOCK: Nothing else from Google. Thank you, Your Honor.

THE COURT: All right. So my hope is you will get that amended proposal to the Court sooner rather than later.

MR. LANIER: Your Honor, if we can't get it to you today, it will be to you by 10:00 tomorrow morning.

THE COURT: All right. Thank you, counsel.

We'll stand in recess.

(Adjourned at 10:32 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, Gayle Wear, Federal Official Court Reporter, in and for the United States District Court for the Eastern District of Texas, do hereby certify that pursuant to Section 753, Title 28 United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated 8th day of May 2024.

/s/ Gayle Wear
GAYLE WEAR, RPR, CRR
FEDERAL OFFICIAL COURT REPORTER